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MEMO

To: Deputy Attorneys General and Staff
From: Attorney General Kathleen Jennings
Re: Fairness and Equality in the Criminal Justice System: Internal Policies
Date: February 15, 2019

The Delaware Department of Justice (DOJ) remains committed to making the criminal justice system fair, equal, and accessible to every person regardless of race, income or ZIP code. Prosecutors have a unique and powerful role in how the system operates. Unlike any other attorneys, we are ethically bound to consider and protect the rights and needs of all Delawareans—victims, the public, and the accused. Our overarching responsibility is to do justice; that is, to do the right thing in every action we take. Prosecutors have the power to charge or not to charge; to choose which charges to bring; to offer a plea or not, and to recommend a sentence. These decisions substantially impact peoples' lives, their sense of justice, their liberty, their livelihood, and their families, in addition to the community's fundamental faith in the system. These are decisions you make every day, often with limited resources, and they are decisions I made throughout my career as a Deputy.

Many of you, and the public, are frustrated by aspects of the criminal justice system. Overabundant and redundant minimum mandatory sentences, laws that disproportionately impact traditionally underrepresented, economically challenged people, and the collateral consequences of criminal records have contributed to the high rates of incarceration and recidivism that lead to us seeing many of the same defendants over and over again. We cannot control what other agencies or stakeholders do, but we can change our practices and policies to reverse this trend and increase fairness and proportionality in the system, while at the same time improving public safety and restoring community trust.

Make no mistake: I know you work tirelessly, night and day, to protect us and to do justice. This change in direction and focus is not a condemnation of all

ideologies and philosophies of the past, or the fine public servants who were dedicated to those ideals. Indeed, I've spent the majority of my career here. Rather, this is a reaction to the realities of the present. We must adapt. The problematic issues are systemic and not attributable to the outstanding individuals who work here, but we are uniquely positioned to help.

These changes are designed to call more attention and resources to be devoted to the offenders who are driving a significant proportion of serious and violent crime, while reducing the impact on low-level, non-violent or first time-offenders for whom rehabilitation and second chances should be the goal.

DOJ Internal Measures

An internal working group of experienced prosecutors from all three counties examined and recommended ways to change our practices while continuing to keep Delawareans safe. I am grateful for their hard work, over and above their caseload. I have considered and incorporated several recommendations. Effective immediately, the Department of Justice and its Deputies and staff will observe the following presumptive guidelines in criminal cases:

1. Charging.

For all cases charged from this day forward:

- a) We will adopt an office-wide presumption not to charge multiple minimum mandatory crimes when one crime accounts for the facts and circumstances of an event. Deputies will focus on limiting the number of charges in an indictment to those that most accurately reflect the misconduct and are most provable.
- b) Deputies will only move to declare a defendant a habitual offender with State Prosecutor approval. We should not file a habitual offender petition unless we are seeking to go above a statutory maximum at sentencing out of concern for public safety.
- c) Addiction and mental illness drive a substantial number of crimes in Delaware. We must support alternatives to criminalizing addiction and mental illness by diverting people who commit low-level crimes to evidence-based treatment programs and away from the system altogether.

- d) We must never impose a zero-tolerance condition upon a person seeking drug, alcohol or mental health treatment, because the path to rehabilitation is never linear. Where there is sufficient evidence to charge, Deputies will utilize discretion to divert more people from the criminal justice system, when it is safe to do so, based upon their need for addiction services and/or mental health treatment. Absent extraordinary circumstances, Deputies should not require an admission of guilt as a prerequisite to entry into court-run diversion programs.¹
- e) We will continue to encourage alternatives to prosecution for misdemeanor possession of marijuana or paraphernalia charges related to marijuana possession. We will encourage police agencies to expand the use of civil citations of marijuana possession in lieu of criminal arrest.
- f) Unless approved by the State Prosecutor, we will not prosecute a person for simultaneously possessing a legally owned firearm and a misdemeanor amount of marijuana. Persons prohibited from owning a firearm will be charged with illegal possession of a firearm.
- g) We will encourage alternatives to prosecution for Prostitution. We will be cognizant of the potential for accused sex workers to be victims of sex trafficking and always make an appropriate law enforcement referral when we suspect a defendant is a victim of human trafficking. We will also refer people charged with Prostitution to specialized treatment courts designed to assist them.

2. Bail.

Although the Courts determine the bail system, I will transmit to the judiciary our strong preferences, including the following:

- a) DOJ's presumptive bail request for misdemeanors will be "release on own recognizance" (ROR) or unsecured bail, with the exception of crimes involving child victims, violence, and domestic violence.
- b) Deputies are encouraged to seek a reduction of bail for defendants held solely on misdemeanor offenses whose cases do not resolve during a

¹ Where critical evidence or witnesses may become unavailable if trial is delayed, a conditional guilty plea is warranted.

scheduled calendar (unless the offenses involve child victims, violence, or domestic violence).

Further, I am sending a letter to the Courts requesting that all currently held defendants who meet the above criteria be brought to court for a review of their conditions as soon as possible.

3. Pleas.

When fashioning plea offers and resolutions:

- a) Deputies will continue to take into account harm to the victim and the victim's need for justice.
- b) Deputies will continue to take defendant's rehabilitative needs and background into account and encourage defense counsel and others to provide information on those needs. This will include relying on mental health or drug treatment needs before pleading or recommending a prison sentence. I have already encouraged this with defense attorneys and will continue to do so.
- c) When appropriate, Deputies will consider alternatives to prison that limit collateral consequences while accounting for public safety (e.g., house arrest).
- d) Deputies will continue to consider whether a person can safely reside in a community-based residential program, rather than in prison.
- e) Deputies will avoid conditioning a plea on the timing of a motion hearing in victimless crimes unless there is an appropriate reason, such as a vulnerable victim.
- f) Deputies will encourage judicial discretion by leaving sentence recommendations "open" in plea agreements when appropriate.

4. Sentencing.

- a) Authorization from the State Prosecutor is required when seeking a prison sentence above 20 years in a case other than Murder First Degree, Murder Second Degree, Manslaughter, Sex Offenses, and Child Abuse.
- b) In routine misdemeanor or felony cases, Deputies are encouraged to recommend sentences at the lower end of the SENTAC Guideline range, unless aggravating circumstances outweigh mitigating circumstances. This policy does not apply to homicides, child abuse, violent felonies, sexual offenses, firearms offenses, or violations of the public trust.
- c) For Guideline sentences of 0 to 12 months, Deputies should ask for probation or home confinement, when appropriate.
- d) Studies show that most probation violations occur within the first year, and additional years are unnecessary with lower level offenses. Deputies will keep probation recommendations to a one-year maximum unless the conviction is for a violent felony or top-tier drug crimes.
- e) Over 90% of defendants sentenced to prison will reenter society, and it is critical that we recommend sentences that will increase the likelihood of successful reentry. Deputies will fashion sentencing recommendations to account for the individual circumstances of the case, including the victim's need for justice and recompense, as well as the defendant's needs for rehabilitation and reintegration back to society.
- f) Deputies will consider restorative justice processes that will help victims heal while also impressing upon the defendant the negative impact of his or her actions on the victim and society.

5. Probation violations.

- a) Deputies will work with Delaware Probation and Parole to avoid recommending prison sentences for technical violations, such as missed curfews, etc.
- b) Deputies will not recommend zero-tolerance conditions of probation for people addicted to drugs or alcohol.

- c) Deputies will oppose the issuance of warrants, or the revocation of driving licenses, for failure of a person to pay a fine when the defendant is without the ability to pay. For example, Deputies will oppose all such warrants when the defendant is indigent and is represented by the Office of Defense Services.

6. Children.

- a) Deputies will not pursue adult charges against children in Superior Court unless approved by the State Prosecutor. If a Deputy recommends prosecuting a child as an adult, the Deputy will continue to ensure that all relevant information is available, including family, educational, mental health and treatment information, as well as prior rehabilitative efforts.
- b) In assessing a case involving a child, Deputies will consider the effect of a child's background and special needs, including the effect of trauma, on all disposition recommendations. With respect to bail, Deputies will only seek pretrial detention where there is no safer alternative.
- c) Deputies will utilize extended Family Court jurisdiction when necessary to further a child's rehabilitative efforts and ensure public safety.
- d) Deputies will support expansion of the use of civil citations.

7. Expungements, Pardons and Commutations.

- a) Deputies will support expungements for arrests for crimes that are now legal, as well as prior arrests for possession of marijuana and paraphernalia crimes related to marijuana possession.
- b) Deputies will support expungements when a *nolle prosequi* has been entered based upon insufficient evidence when the underlying offense is nonviolent in nature.
- c) Deputies will support pardon applications when a person applies in connection with a crime for which there is no violence and the crime is isolated in nature, when the applicant has demonstrated sufficient rehabilitation.

- d) Deputies will support commutation applications when the crime for which the applicant is seeking relief is nonviolent in nature.
- e) Deputies will continue to support pardons and commutations when justice and fairness require. When in doubt, Deputies should consult with the State Prosecutor, Chief Deputy, and/or the Attorney General.

8. Other Considerations In Charging and Prosecution

- a) Deputies will take into account collateral consequences to undocumented victims or witnesses when deciding how to present a case.
- b) Deputies will continue to use eyewitness identifications consistent with statewide eyewitness identification policy.
- c) Consistent with the law, deputies will practice open discovery as a matter of course.
- d) Deputies will examine any forensic evidence to ensure that it is scientifically sound.

The Department of Justice has determined that the direction and guidelines set forth in this document are of such importance that the public ought to be made aware of them. As has been referenced repeatedly in this document, justice is not a “one size fits all” concept. Differing facts and circumstances will require different methods to achieve justice for victims and defendants. While the aforementioned policies and practices are intended to provide general direction and guidance to employees of the Department of Justice regarding the exercise of prosecutorial discretion, nothing in this document is intended to establish a rule of law or procedure enforceable by any third party. Similarly, nothing in this document shall create any enforceable right, entitlement, or privilege to a specific outcome in any criminal or civil matter, nor shall it constitute a waiver of the immunities available to the State or State employees.